MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Tum Uk,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

February 14, 2024

Court of Appeals Case No.
23A-CR-616

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No.
49D21-2203-F1-5606

Memorandum Decision by Judge Kenworthy
Chief Judge Altice and Judge Weissmann concur.

Kenworthy, Judge.

[1] Tum Uk appeals his conviction for Level 1 felony child molesting,[1] raising two issues for our review:

> 1. Did the trial court commit fundamental error by permitting the State to amend Uk's charging information to add one count of Level 1 felony child molesting although the information did not allege a *mens rea* element?
>
> 2. Does sufficient evidence support Uk's conviction?

[2] Discerning no fundamental error and concluding sufficient evidence supports Uk's conviction, we affirm.

Facts and Procedural History

[3] Throughout much of the time between 2013 and June 2021, S.P. and her family lived with Uk—a relative of S.P.'s mother. During this period, Uk molested S.P., S.P.'s sister, and S.P.'s close friend.[2] On one occasion, Uk touched S.P.'s vagina by sliding his thumb underneath her underwear while giving her a "piggy-back ride." *Tr. Vol. 2* at 63. Uk did not put his thumb "inside" of S.P.'s vagina. *Id.* at 88. Rather, Uk placed his thumb "in between the flaps of [S.P.'s] vagina" and moved it around. *Id.* at 93. Later, when shown a drawing of a

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[1] Ind. Code § 35-42-4-3(a)(1) (2015).

[2] Uk was convicted of several offenses related to molesting S.P., S.P.'s sister, and S.P.'s close friend. Included here are the facts relevant to Uk's conviction for Level 1 felony child molesting—the only conviction Uk challenges on appeal.

female, S.P. correctly identified the vagina—which was depicted by a line. In reference to the drawing, S.P. explained Uk's thumb would be "either on the line or like . . . between the line." *Id.* at 66.

[4] In the fall of 2021, S.P. went through a body safety course at her school. Soon after, S.P. disclosed to her school counselor that Uk had touched her inappropriately.

[5] The State charged Uk in an eleven-count information consisting of one count of Level 1 felony attempted child molesting, nine counts of Level 4 felony child molesting, and one count of Level 6 felony dissemination of matter harmful to minors. On June 17, 2022, the State moved to amend the information by adding one count of Level 1 felony child molesting ("Count 12"). Uk objected, arguing the amended information was untimely. Uk did not move to dismiss Count 12. The trial court granted the State's motion to amend a few days later.

[6] Uk waived his right to trial by jury. At the end of Uk's bench trial, the trial court found Uk guilty on Count 12 and five counts of Level 4 felony child molesting. The trial court sentenced Uk to an aggregate sentence of thirty years.

[7] About a month after sentencing Uk, the trial court held a hearing on its own motion to determine whether to reduce Uk's Level 1 felony child molesting conviction to a Level 4 felony. In the end, the trial court did not reduce Uk's conviction.

1. Omission of Mens Rea Element in Amended Information Did Not Constitute Fundamental Error

[8] Uk contends the omission of a *mens rea* element from Count 12—the Level 1 felony child molesting information—amounted to fundamental error because it failed to allege an offense under Indiana law. Count 12 of the amended information read:

> Between October 17, 2015 and October 16, 2018, Tum Uk, a person of at least twenty-one (21) years of age, did perform or submit to other sexual conduct as defined in Indiana Code Section 35-31.5-2-221.5 with S.P., a child under the age of fourteen (14) years[.]

Appellant's App. Vol. 2 at 106. The statute under which Uk was convicted provides, in pertinent part:

> A person who, with a child under fourteen (14) years of age, *knowingly or intentionally* performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) commits child molesting . . . a Level 1 felony if . . . it is committed by a person at least twenty-one (21) years of age[.]

I.C. § 35-42-4-3(a)(1) (emphasis added). As apparent from the statutory language, *mens rea*—here, knowingly or intentionally—is an essential element of the crime of child molesting.

[9] The Sixth Amendment to the United States Constitution and Article 1, § 13 of Indiana's Constitution require that a defendant be informed of the nature and cause of the accusation against him. U.S. Const. amend. VI; Ind. Const. art. 1,

§ 13. This requirement is carried out through Indiana Code Section 35-34-1-2(a)(4), which requires the charging information to be in writing and "set[] forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition." Minor variances from the statutory language do not make an information defective, "so long as the defendant is not misled or an essential element of the crime is not omitted." *Miller v. State*, 634 N.E.2d 57, 60 (Ind. Ct. App. 1994). Here, the information charging Uk with Level 1 felony child molesting was defective for not alleging a *mens rea*, an essential element of the crime. *See* I.C. § 35-42-4-3(a)(1).

[10] Ordinarily, "[t]he proper method to challenge deficiencies in a charging information is to file a motion to dismiss the information" no later than twenty days before the omnibus date. *Milo v. State*, 137 N.E.3d 995, 1003 (Ind. Ct. App. 2019) (quoting *Miller*, 634 N.E.2d at 60), *trans. denied*; I.C. § 35-34-1-4(b)(1). Failure to do so results in waiver. *See Milo*, 137 N.E.3d at 1003. Because Uk neither moved to dismiss Count 12 nor objected on the grounds he now asserts on appeal, he must show the trial court committed fundamental error to prevail. *See, e.g., Trice v. State,* 766 N.E.2d 1180, 1182 (Ind. 2002) (explaining the doctrine of fundamental error allows appellate review of an unpreserved error).

[11] The "fundamental error" exception to waiver is "extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

This "formidable standard . . . applies only where the error is so flagrant that the trial judge should have corrected the error on [their] own, without prompting by defense counsel." *Tate v. State*, 161 N.E.3d 1225, 1229 (Ind. 2021).

[12] "The purpose of the charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense." *State v. Katz*, 179 N.E.3d 431, 441 (Ind. 2022) (quotation omitted). Thus, for omission of a *mens rea* element from the information to constitute fundamental error, it must mislead the defendant or fail to give him notice of the charges against him so that he is unable to prepare his defense. *See Myers v. State*, 510 N.E.2d 1360, 1367 (Ind. 1987).

[13] Uk directs our attention to *Jackson v. State* in support of his claim that the trial court committed fundamental error. 84 N.E.3d 706 (Ind. Ct. App. 2017), *summarily aff'd in relevant part*, 105 N.E.3d 1081, 1084 (Ind. 2018). In *Jackson*, the State amended the language of Jackson's charge of the criminal gang enhancement to allege that Jackson "was a known member of a criminal gang[] while committing the underlying felony offense." *Id.* at 710. The amended charge omitted a material element—the *mens rea*—from the statute and *added* an element not within the statute: that Jackson was "a known member" of a criminal gang. *Id.* at 712. Because of those changes, the amended charge was "substantially different from the statutory language and carrie[d] a wholly different meaning." *Id.* Additionally, the "fundamental nature of the erroneously amended charge had a direct impact throughout [Jackson's] trial"

as Jackson's counsel "repeatedly emphasized in his arguments to the jury and in his cross-examination of the witnesses" the part of the amended information alleging Jackson was "a known member" of a gang. *Id.* at 713–14 (explaining Jackson framed his defense solely in terms of the erroneous language in the amended information to the exclusion of any other defense). The *Jackson* Court reversed because "[i]n its operation and effect, the amended charge poisoned the well as it skewed the evidence and argument and caused the defendant to be tried for and defend against an offense that does not exist under the [criminal gang enhancement] statute." *Id.* at 714.

[14] Uk urges us to adopt the same conclusion here. Like the amended information in *Jackson*, Uk's information omitted a *mens rea* element. But Uk's information did not add an element to the child molesting statute—let alone an element that caused the amended charge to be "substantially different from the statutory language and carry a wholly different meaning." *Id.* at 712. Uk's information was deficient because it lacked an essential element, but it did specify the statutory subsection under which Uk was charged, the child Uk allegedly molested, the act Uk allegedly committed, and the date range during which the alleged act occurred. At trial, Uk's primary defense to Count 12 was that S.P's testimony was not credible and that he never penetrated her vagina. Uk's defense therefore did not center on a misunderstanding of the *mens rea* element—*i.e.*, he was not misled by the omission. Plus, Uk opted for a bench trial. And we presume the trial court knows and follows the applicable law. *Tharpe v. State*, 955 N.E.2d 836, 842 (Ind. Ct. App. 2011), *trans. denied*.

[15] In sum, Uk was aware of the events constituting his crime. And although an essential element of the crime was omitted from the information, we cannot say it prevented Uk from presenting a defense to the charge and was not fundamental error.

2. Sufficient Evidence Supports Uk's Conviction

[16] Uk argues the evidence was insufficient to prove he penetrated S.P.'s vagina. A sufficiency-of-the-evidence claim warrants a "deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility[.]'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). Rather, "we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). "We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)).

[17] To convict Uk of Level 1 felony child molesting as charged, the State was required to prove Uk, being at least twenty-one years old: (1) knowingly or intentionally; (2) performed or submitted to; (3) other sexual conduct; (4) with S.P., a child under fourteen years of age. I.C. § 35-42-4-3(a)(1). "'Other sexual conduct' means an act involving . . . the penetration of the sex organ or anus of

a person by an object." I.C. § 35-31.5-2-221.5. A finger qualifies as an "object" in this context. *Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022). Proof of "the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient to demonstrate a person performed other sexual []conduct with a child." *Boggs v. State*, 104 N.E.3d 1287, 1289 (Ind. 2018) (per curiam).

[18] As our Supreme Court has described, a detailed anatomical description of penetration is unnecessary and undesirable for two reasons. First, "many people are not able to articulate the precise anatomical features that were or were not penetrated." *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996). And second, "to require such detailed descriptions would subject victims to unwarranted questioning and cross-examination regarding the details and extent of penetration." *Id.* Put simply, "any penetration is enough" so long as the fact finder hears evidence from which it could find the defendant guilty beyond a reasonable doubt. *See id.*

[19] S.P. testified that Uk slid his thumb under her underwear and touched her vagina. Uk moved his thumb around while touching her vagina. *See Hale v. State*, 128 N.E.3d 456, 463 (Ind. Ct. App. 2019) (determining evidence defendant touched the victim's vagina with his finger or hand using an "up and down" or "circular" motion was sufficient to support conviction for Level 1 felony child molesting because it would have been impossible for defendant to touch victim's vagina without having first penetrated her external genitalia), *trans. denied*. Even though S.P. said Uk's thumb did not go "inside" her vagina,

she confirmed Uk's thumb went "in between the flaps" of her vagina. *Id.* at 88, 93. *See Boggs*, 104 N.E.3d at 1288 (concluding evidence defendant placed his finger "in the folds" of the victim's vagina was sufficient to prove "penetration" for purposes of statute defining other sexual conduct); *see also Seal v. State*, 105 N.E.3d 201, 211 (Ind. Ct. App. 2018) (concluding evidence defendant used his finger to touch the victim "between the labia . . . in between the crack . . . where the clitoris is" was sufficient to prove penetration of the female sex organ), *trans. denied*.

[20] Further, S.P. correctly identified her vagina on a drawing of a female. When asked about the line depicting the vagina, S.P. explained Uk's thumb would be "either on the line or like . . . between the line." *Tr. Vol. 2* at 66. Uk notes the portion of the drawing identified by S.P. as her vagina contains several lines. So in his view, it is unclear S.P.'s reference to "between the line" referred to her vagina. But this is a request to reweigh the evidence and judge witness credibility; tasks we cannot undertake. *See Owen*, 210 N.E.3d at 264.

[21] At bottom, S.P. was not required to provide a detailed anatomical description of the penetration. *See Spurlock*, 675 N.E.2d at 315. And proof of "the slightest penetration" of S.P.'s vagina, including penetration of her external genitalia, was sufficient to show Uk performed other sexual conduct with S.P. *See Boggs*, 104 N.E.3d at 1289. In other words, the State presented sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Uk committed Level 1 felony child molesting.

Conclusion

[22] Discerning no fundamental error in the amendment of the charging information and concluding sufficient evidence supports Uk's conviction, we affirm.

[23] Affirmed.

Altice, C.J., and Weissmann, J., concur.

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